

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSE HUMBERTO BARILLAS,

Petitioner,

v.

JAMES S. HILL, Warden,

Respondent.

Case No. [22-cv-02957-AMO](#) (PR)

**ORDER OF DISMISSAL WITHOUT
PREJUDICE**

Petitioner Jose Humberto Barillas, a state prisoner, filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his state conviction of multiple crimes for sexually abusing a child.

In an Order dated December 7, 2023, the Court granted Respondent's motion to dismiss petition upon concluding that the petition was mixed, that is, that it contained both exhausted and unexhausted issues. Dkt. 22. Generally, a federal district court must dismiss a federal habeas petition that contains claims for which state remedies have not been exhausted. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982). However, instead of an outright dismissal of the action, the Court allowed Barillas to choose whether he wanted to "(1) file an amended petition that include[d] only his two exhausted claims (Claims 1 and 2) and strike[] the remaining unexhausted Claim 3, or (2) file a request for a stay of this matter while he exhausted his unexhausted Claim 3 in state court." *Id.* at 6. Barillas was instructed to notify the Court of his choice within twenty-eight days and that a failure to do so would result in the dismissal of his petition.

Barillas did not make an election within the time allotted. Because Barillas has failed to make an election, the petition is DISMISSED as mixed. *See Rose*, 455 U.S. at 522. The dismissal is without prejudice to Barillas filing a new federal habeas action containing a petition with only

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exhausted claims.

The Clerk of the Court shall terminate all pending motions and close the file.

IT IS SO ORDERED.

Dated: February 12, 2024



ARACELI MARTÍNEZ-OLGUÍN
United States District Judge